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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 383

ALBERT C. LEE,
Appellant,

vs.

KANSAS CITY, MISSOURI,
Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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No. .....

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APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Respondent-Appellee, City of Kansas City, Missouri, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed for the reason that the jurisdiction of this Court is not properly invoked under Title 28, United States Code, Section 1257(2), on the grounds that it does not present any substantial federal questions reviewable by this Court and that the judgment of the Supreme Court of Missouri

on certain questions presented rests on an adequate non-federal basis, or in the alternative, that the final judgment and decree of the Supreme Court of Missouri be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument on the merits.

OPINIONS BELOW

The opinion of the Circuit Court of Jackson County, Missouri at Kansas City, Division No. 11 (Appendix to Appellant's Jurisdictional Statement, A5-A6) is not officially reported. The opinion of the Supreme Court of Missouri, Division No. 1, is officially reported in Vol. 414, Southwestern Reporter, 2nd Series, at page 251 (414 SW 2d 251) (Appendix to Appellant's Jurisdictional Statement A1-A4).

MUNICIPAL ORDINANCE INVOLVED

The municipal ordinance of the City of Kansas City, Missouri involved in this appeal (Set forth in the Appendix to Appellant's Jurisdictional Statement, A1 and A2) is as follows:

> "Section 23.110. Unlawful to possess a federal stamp.—It shall be unlawful for any person within the corporate limits of Kansas City, Missouri, to possess with intent to use for gambling purposes, a federal wagering stamp, as provided by the provisions of the internal revenue code of 1954, as amended, enacted by the Congress of the United States.
>
> "Each day any person possesses, with intent to use for gambling purposes, within the corporate limits of Kansas City a federal wagering stamp shall constitute a separate offense. Any person violating the provisions of this section shall be guilty of a misdemeanor."

QUESTIONS PRESENTED

1. Does Section 23.110, Chapter 23, Revised Ordinances of Kansas City, Missouri, 1956, as amended, in the abstract and without reference to the facts involved in this appeal, violate the rights guaranteed and the protections maintained by the due process clause of the 14th Amendment to the Constitution of the United States by permitting the conviction and punishment of a person for mere intent to commit an unlawful act or for his state of mind unconnected with any overt act prohibited or prescribed by law?

   A. In determining whether Section 23.110 of the Revised Ordinances of Kansas City, Missouri, 1959, as amended, was lawfully enacted and within the fundamental limitation imposed by the guarantees of due process, may the scope of the powers of the City of Kansas City, Missouri, to control, suppress, regulate and prohibit gambling equipments, devices, activities, trades and businesses be considered?

   B. Did the Supreme Court of Missouri properly construe and interpret Section 23.110 of the Revised Ordinances of Kansas City, Missouri, in holding that such legislation is directed against possession of a federal wagering stamp with a certain requisite intent and does not permit a conviction merely for an intent to use a federal wagering stamp for gambling purposes?

2. Does the decision of the Supreme Court of Missouri, that the facts as shown by the evidence in the record were sufficient to establish the essential elements of an offense under Section 23.110, Revised Ordinances of Kansas City, 1956, as amended, and that the trial court erred in requiring proof of an overt act of gambling to sustain a finding of guilty, render the language of the ordinance

so uncertain and indefinite as to violate the fundamental principles of justice and fairness required by the due process of law clause contained in the 14th Amendment to the Constitution of the United States?

3. Does the interpretation and construction of Section 23.110, Revised Ordinances of Kansas City, 1956, as amended, given it in the decision of the Supreme Court of Missouri, improperly and unconstitutionally place the burden of proof upon the Appellant and does it thereby destroy the presumption of innocence required by the due process of law guarantees under the 14th Amendment to the Constitution of the United States?

JURISDICTION

The basis for jurisdiction asserted by Appellant is set forth in his jurisdictional statement.

STATEMENT

This appeal is taken from the decision of the Supreme Court of Missouri, the highest judicial body in and court of last resort for the State of Missouri, which was rendered and filed on April 10, 1967, wherein the Supreme Court held that Section 23.110, Revised Ordinances of Kansas City, Missouri, 1956, as amended, does not violate the due process clauses of the Constitution of the State of Missouri or the 14th Amendment to the Constitution of the United States. The decision further held that the facts as shown by the evidence in the record were sufficient to establish the essential elements of the offense charged under said section of the Revised Ordinances of Kansas City, and reversed the acquittal of Appellant Albert C. Lee of a violation of said ordinance as he was charged and tried, and remanded the cause.

An information was filed in the Municipal Court of Kansas City, Missouri, charging Appellant Albert C. Lee with a violation of Section 23.110 of the Revised Ordinances of Kansas City, Missouri, 1956, as amended, and in particularity, alleged that Lee did on or about the 16th day of November, 1965, unlawfully possess a federal wagering stamp with intent to use the same for gambling purposes, all within the corporate limits of Kansas City. From the judgment of the Municipal Court of Kansas City, quashing the information and discharging the defendant on the ground that said section of the ordinances was unconstitutional, Respondent Kansas City duly and properly appealed the judgment to the Circuit Court of Jackson County, Missouri, at Kansas City. Appellant Lee was also charged by another separate information with a violation of Section 23.050 of the Revised Ordinances of Kansas City, Missouri, 1956, as amended, which ordinance made it unlawful for any person to have in his possession or under his control any gambling device or gambling paraphernalia capable of no lawful use. Upon agreement of the defense counsel for Lee, both charges were consolidated and the cause was heard and tried de novo on December 10, 1965, before the Court without jury on both of the alleged violations.

Appellant's counsel again renewed objections to the information and presented certain motions primarily upon the ground that Section 23.110 under which Lee was charged, making it unlawful for any person within the corporate limits of Kansas City, Missouri, to possess a federal wagering stamp with intent to use it for gambling purposes, was unconstitutional and in contravention of the due process of law guarantees of Article I, Section 10 of the Constitution of Missouri, 1945, and Section 1 of the 14th Amendment to the Constitution of the United States. Hav-

ing heard the evidence as presented by the prosecution and received Exhibits No. 1, No. 2 and No. 3, which are a part of the evidence in the record before the Supreme Court of the State of Missouri and part of the record on this appeal, the Court dismissed the information and discharged Lee in accordance with the trial court's findings of fact and conclusions of law.

The trial judge of the Circuit Court of Jackson County, Missouri, found as a matter of fact that Appellant Lee did on the date charged in the information possess a federal wagering stamp, as provided by the provisions of the Internal Revenue Code of 1954, as amended, enacted by the Congress of the United States, but concluded as a matter of law that possession of said wagering stamp, unaccompanied by an overt act toward the perpetration of an act of gambling, although accompanied by an intent to use it for gambling purposes within the corporate limits of Kansas City, Missouri, did not constitute an offense under Section 23.110 of the Revised Ordinances of Kansas City, Missouri, 1956, as amended. Secondly, the trial judge found as a matter of fact that Lee, on the same date and at the same time he had in his possession the federal wagering stamp, also possessed certain gambling equipment, but the court concluded as a matter of law that possession of such gambling equipment could not be considered and was not admissible for the purpose of establishing the "intent to use for gambling purposes" prerequisite and essential element to a conviction under Section 23.110. Moreover, and in addition thereto, the court separately concluded as a matter of law that the section of the ordinances prohibiting the possession of a federal wagering stamp within the corporate limits of Kansas City constituted a denial of due process of law and was therefore in contravention of Article I, Section 10, of the Constitution of Missouri, 1945, and Section 1 of the 14th Amendment to the Constitution of the United States.

From this judgment of the Circuit Court of Jackson County, Missouri, entered on March 11, 1966, Respondent City of Kansas City, Missouri, prosecuted an appeal thereof to the Supreme Court of Missouri, and presented thereto two basic questions for the Supreme Court's determination; (1) Did the City of Kansas City have authority to make it unlawful for a person to possess the federal wagering stamp with intent to use it for gambling purposes within the corporate limits of Kansas City, Missouri, or, expressed in other words, was Section 23.110, Revised Ordinances of Kansas City, Missouri, 1956, as amended, in contravention with and does it constitute a violation of the due process of law guarantees protected by the state and federal constitutions; (2) Was the evidence presented in the trial of the cause and preserved in the record sufficient to make out a prima facie violation of Section 23.110 as charged and sufficient to sustain the necessary burden of proof on the prosecution of Appellant Lee's guilt of a violation of the provisions of Section 23.110, of the Revised Ordinances of Kansas City, Missouri, 1956, as amended.

Section 23.110, of the Revised Ordinances of Kansas City, Missouri, 1956, as amended, was enacted by the City Council of Kansas City in February, 1964, in the exercise of express powers granted the City Council by Section 1(44) and the implied general powers granted by Section 1(61) and 1(63) of the constitutional Charter of Kansas City, Missouri, 1925, as amended. Section 1(44), Article I, expressly grants to the Council of Kansas City the power:

> "To regulate, prohibit or suppress any act, conduct, or suit, employment, practice, game, sport, or contest, place or thing whatsoever, which may be injurious or detrimental to the public morals, health, safety, comfort, convenience, prosperity or general welfare . . . to prevent and suppress betting and gambling; gam-

> bling and betting houses, places, rooms or devices; to regulate . . . or prohibit . . . betting rooms, lotteries, or places where any game in which chance predominates, played for anything of value; and punish any and all persons who may engage in such game or games . . . or set up or permit the same, or who conduct lotteries, or sell lottery tickets; to prohibit the sale, distribution or gift, directly or indirectly of lottery tickets . . . to suppress places where lottery tickets, notices, circulars and advertisements of lotteries and lottery drawings are kept, sold, distributed, or given away . . ."

Section 1(61) and Section 1(63), Article I of the constitutional Charter of Kansas City provide in their pertinent parts as follows:

> "To enact all needful ordinances . . . for promoting the public health, safety, convenience, comfort, morals, prosperity and general interest and welfare . . ."

And,

> "To enact, adopt and enforce all ordinances, rules and regulations to do all things, and to exercise all governmental and municipal powers necessary, needful, and convenient, contributing to or bearing a substantial relation to the full and complete exercise of all the powers in this charter enumerated."

Appellant Lee does not contend that the foregoing provisions of the Charter of Kansas City, Missouri, are contrary to the Missouri Constitution or the Constitution of the United States. Rather, he alleges that the enactment of Section 23.110 of the Revised Ordinances is in contravention of the due process guarantees protected by the state and federal constitutions. Appellant contends that his conviction for a violation of said section of the ordinances constitutes a denial of due process of law because the provisions of the ordinance permit a conviction for mere intent to use a federal wagering stamp for gambling purposes or the mere state of mind with which the federal wagering

stamp is possessed, and because, by the decision of the Supreme Court of Missouri, he was adjudged guilty under the facts as shown by the evidence in the record for a violation without the showing of an overt act of gambling. These contentions were clearly and expressly denied by the Supreme Court of Missouri, Division No. 1.

ARGUMENT

The decision of the Supreme Court of Missouri, Division No. 1, is correct on all issues and questions raised before that Court and on this appeal again sought to be reviewed, and Respondent's motion should be granted. The issues raised by Appellant, as stated in his questions presented, are a frivolous attempt to seek the review by the United States Supreme Court of matters decided by the application of state law by the Supreme Court of Missouri and none of which raise substantial federal questions. Although Appellant has averred and formally preserved his contentions that Section 23.110, Revised Ordinances of Kansas City, 1956, as amended, is repugnant to the due process of law guarantees reserved by the 14th Amendment to the Constitution, the attack based on such questions was clearly denied by the Supreme Court of Missouri, and the construction placed on the ordinance in controversy by Appellant for the purpose of rearguing its constitutionality and seeking appeal to this Court was found to the contrary by the Supreme Court of Missouri. Therefore, on the face of the record Appellant's attempt to raise questions on this appeal for purposes of review of the state court's decision on, for jurisdictional purposes, matters of state law, is clearly wanting in foundation and so unsubstantial and frivolous as to be devoid of merit.

Appellant's federal questions presented as contained in his jurisdictional statement, Pages 3 and 4, raise one and

only one fundamental issue—whether Section 23.110 of the Revised Ordinances of Kansas City, Missouri, 1956, as amended, in making it unlawful for any person within the corporate limits of Kansas City, Missouri, to possess a federal wagering stamp with intent to use it for gambling purposes, violates the due process clause of the 14th Amendment to the Constitution of the United States because it does not provide in its terms as one of the essential elements of the offense proof of an overt act of gambling, or in other words that due process requires that the possession must be accompanied by an overt act of gambling before the possession becomes prohibited and proscribed by the terms of the said ordinance. Appellant does not in any respect attack the vestiture of power in the Council of Kansas City, Missouri, to enact ordinances for the purposes of controlling, regulating, suppressing or prohibiting gambling activities within its corporate limits. Nor for that matter, does Appellant in any respect distinctly and clearly raise issue that the intended prohibition established by Section 23.110 is a lawful and reasonable exercise of this power. Appellant's principal attack is solely and exclusively founded on the contention that Section 23.110 is unconstitutional, according to Appellant's interpretation, which the Supreme Court of Missouri denied, because it attempts to make any offense rest solely upon intent to commit an unlawful act or to engage in an unlawful activity, unaccompanied by an overt act directed to the achievement of such an unlawful purpose.

This Court has traditionally adhered to the principle that it does not have jurisdiction and will not undertake to review the legislative "means" of obtaining an otherwise lawful public purpose. *Berman* v. *Parker*, 348 U.S. 26, 33, 99 L.Ed. 27, 75 S.Ct. 98. Although the issue of repugnancy to the due process of law clause of the 14th Amendment to the United States Constitution may be raised and averred, this Court will not in considering such an issue pass judg-

ment upon the wisdom, expediency and necessity of the legislation. This Court strictly adheres to the fundamental principle that such questions are matters of political concern, not judicial, and therefore, questions not subject to review by this Court.

This Court in commenting upon this long standing rule commented in *Nebbia* v. *New York*, 291 U.S. 502, 525, 537-538, 78 L.Ed. 941, 950, 957, ... S.Ct. ....., that:

> ". . . The guarantee of due process, as has often been held, *demands only that the law shall not be unreasonable, arbitrary or capricious*, and that the means selected *shall have a real and substantial relation to the object sought to be obtained*. . . .
>
> * * *
>
> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and one neither arbitrary nor discriminatory, the requirements of due process are satisfied and judicial determination to that effect renders a court functus officio.
>
> ". . . *With the wisdom of the policy adopted, with the adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.* The course of decisions in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that *every possible presumption is in favor of its validity*, and that though the court may hold views inconsistent with the wisdom of the law, it *may not be annulled unless palpably in excess of legislative power.*" (Emphasis supplied).

The Supreme Court of Missouri determined that Section 23.110, Revised Ordinances of Kansas City did bear a real and substantial relation and was fairly referable to the power of the City to suppress and prohibit gambling

and gambling activities within its corporate limits, and therefore, that said ordinance in its purpose and provisions was enacted within and in furtherance of the police powers vested in Respondent City of Kansas City, Missouri.

The Missouri Supreme Court's decision on this issue conclusively determines the same and is not subject to review on appeal by this Court. *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526, 529, 61 L.Ed. 472, 475, 37 S.Ct. 190; *Reinman* v. *Little Rock*, 237 U.S. 171, 176, 59 L.Ed. 900, 35 S.Ct. 511. Therefore, there remains the sole issue raised by appellant's questions presented—is Section 23.110 of the Revised Ordinances of Kansas City on its face and as interpreted by the Supreme Court of Missouri so clearly unreasonable and arbitrary and so vague, uncertain and indefinite as to be repugnant to and in contravention of the requirements and guarantees which are fundamental to the due process of law clause of the 14th Amendment to the Constitution of the United States. Upon this issue, it is the contention of Respondent that the decision of the Missouri Supreme Court which construes and interprets said section of the law, and the decision of that court upon the issues of the sufficiency of the evidence to sustain the conviction of Appellant Lee for an offense committed under the provisions of said ordinance is determinative of all the issues presented and raised in Appellant's Jurisdictional Statement. Under the applicable law as found in the decisions of this Court said questions presented fail to raise any substantial federal question necessitating the review by this Court.

Appellant's Question No. 1

Appellant, by his question No. 1, seeks a determination whether respondent may lawfully enact the ordinance involved in this controversy without requiring in

its terms that the prescribed possession and requisite intent be connected or accompanied with an overt act of gambling. On this question, appellant attempts to argue that the said ordinance therefore on its face violates the due process clause of the 14th Amendment to the Constitution of the United States because:

> "The foregoing ordinance does not prohibit the possession of the wagering stamp . . . It is directed solely against the intent to use the wagering stamp for gambling purposes . . ." (Jurisdictional Statement, 3).

Appellant then argues at Page 6 of his Jurisdictional Statement that "this ordinance does not prohibit the use of a wagering stamp for gambling purposes, it is directed solely against the possession of the stamp with an intent to use it at some future time for an illegal act. It seeks to prohibit that which the law does not make an offense, that is, the intent to commit an act unconnected with any overt act to carry out the intent."

It is this position of appellant upon which he rests his fundamental attack on the decision of the Missouri Supreme Court and the remaining federal questions presented in his Jurisdictional Statement are merely secondary or corollary to appellant's supposition that the ordinance violates due process of law in lacking an express requirement that the prescribed possession and requisite intent be accompanied by an overt act of gambling and that proof of an overt act of gambling be essential to the conviction of appellant for an offense under said municipal ordinance of Respondent City of Kansas City. It was this identical contention made by appellant and this interpretation of Section 23.110 of the Revised Ordinances of Kansas City argued by appellant which were rejected and denied by the Missouri Supreme Court in its decision in holding that the

ordinance in controversy, making it unlawful for any person within the corporate limits of Kansas City to possess a federal wagering stamp with intent to use it for gambling purposes, was not unconstitutional under the due process clauses of the federal and state constitutions. Justice Seiler, delivering the opinion for the Missouri Supreme Court, said:

> ". . . While the possessor of such a stamp is free to show he bought it for an innocent purpose, the city council of Kansas City as the repository of the police powers of the city would be justified in viewing with suspicion and concern the possession of such stamp by its residents. A federal gambling stamp bears a reasonable relationship to gambling . . . the council could reasonably conclude that there was likely to be less gambling in Kansas City if it prohibited the possession of such stamps than if there were no such prohibitions . . .
>
> "*The ordinance is directed against possession with certain intent* of an article which can be reasonably expected, if something is not done about it, to be used to violate the gambling law . . .
>
> ". . . *Respondent's main attack on the ordinance is that it makes intent alone an offense without requiring an overt act.* But the ordinance does not permit a conviction merely by showing that the defendant has an intent to gamble. *It requires proof of possession of a federal wagering stamp with intent to use it for gambling purposes.*" (Emphasis supplied).

The Missouri Supreme Court by the above quoted language has rendered its decision as to the constitutionality of the municipal ordinance, which for the purposes of this appeal has the stature of a state law, and the interpretation and construction of this ordinance given by the decision of the Missouri Supreme Court is directly and clearly contrary to that now argued by Appellant as grounds for review of the Missouri Supreme Court's decision on the issue of constitutionality.

It is this construction and interpretation applied to the said ordinance by the Missouri Supreme Court which by the long history of the decisions rendered by this court are held to be conclusively decided against Appellant upon his first question presented. The Missouri Supreme Court has determined that the prohibition created by the language of Section 23.110 is directed at the possession of a federal wagering stamp with a certain requisite intent—intent to use it for gambling purposes within the corporate limits of Kansas City—and not, as argued now on this appeal by Appellant, directed solely at intent to use a federal wagering stamp for unlawful purposes. The decision of the Missouri Supreme Court on this question of interpretation and construction of the municipal ordinance is conclusively binding and determinative on this Court and thus, Appellant's Question No. 1 does not raise a substantial federal question for review on this appeal. *Reinman* v. *Little Rock*, supra; *Atlantic Coastline* v. *Goldsboro*, 232 U.S. 548, 555, 58 L.Ed. 721, 34 S.Ct. 364; *Maguire* v. *Reardon*, 255 U.S. 271, 273, 65 L.Ed. 625, 631.

As has been said by this Court in *Wilson* v. *State of North Carolina ex rel. Caldwell*, 169 U.S. 586, 592, 42 L.Ed. 865, 870:

> "The highest court of the state has held that this statute was not a violation of the constitution of the state . . .
>
> "Authorities are not required to support the general proposition that in the consideration of the constitution or laws of a state this court follows the construction given those instruments by the highest courts of the state . . ."

The decision that the ordinance in controversy in the instant case is not violative of the state constitution and within the powers granted the Respondent by its Charter

is conclusive on this court, *Hadacheck* v. *Sebastian,* 239 U.S. 394, 60 L.Ed. 348, and furthermore, the Court will not consider questions relating to the scope and meaning to be given such an ordinance. This rule was well stated by this Court in the very early decision rendered in *Smiley* v. *State of Kansas,* 196 U.S. 447, 455, 49 L.Ed. 546, 550:

> "*It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court.* (Cases cited) Nor is it material that the state court ascertain the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from that we recognize . . . The power to determine the meaning of a statute carries with it the power to prescribe its intent and limitation, as well as the method by which they shall be determined." (Emphasis supplied)

In the absence of a violation of a fundamental principle of justice, the Missouri Supreme Court's determination as to the meaning and intention of this municipal ordinance in controversy on this appeal is conclusive as far as any federal question is concerned. *Herbert* v. *Louisiana,* 272 U.S. 312, 316, 71 L.Ed. 270, 272, 47 S.Ct. 103, 48 A.L.R. 1102. In refusing to accept an appellant's suggestion that the state court had misconstrued the state statute and that this Court should consider the statute according to appellant's view of its literal import, this Court in *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners for the State of Montana, et al.,* 332 U.S. 495, 499-500, 92 L.Ed. 99, 105, ... S.Ct. ....., declared:

> "The rule is too well settled to permit a question that this court not only accepts, but is bound by the construction given to the state statutes by the state court."

Appellant strongly argues that this ordinance in controversy is an attempt to make merely the "intent" or a "state of mind" unlawful, and that the provisions of said ordinance do not proscribe some overt act, and for these reasons it violates the fundamental principle of due process of law guaranteed both by the state and federal constitutions that mere intent to commit a crime is not punishable where the person harboring such intent commits no overt act in an effort to perpetrate the crime. The Missouri Supreme Court has denied this contention and has decided and made an interpretation of the provisions of said ordinance to the contrary of that now and then argued by appellant. This interpretation and construction given the municipal ordinance by the Missouri Supreme Court is conclusive and binding upon this Court. Appellant's Question No. 1 fails to raise any substantial federal question which is sufficient to establish the jurisdiction of this Court to review the state court decision, and as appellant would have it, the ultimate reversal by this Court of the decision rendered by the Missouri Supreme Court in *Kansas City* v. *Lee.*

As set forth above, the guarantee of due process demands only that the legislative enactment is not unreasonable, arbitrary or capricious, and in construing the constitutionality of a law, every possible presumption is in favor of its validity, and it shall not be annulled unless "palpably in excess of legislative power." *Nebbia* v. *New York,* supra.

The trend of recent jurisprudence has been to permit broad and relatively unhindered exercises of the rights of local government to regulate, control and even suppress occupations, businesses and acts which are or may be dangerous or unsafe or in some other manner jeopardize the morals, health, safety and welfare of the citizens of the

community. A long line of decisions by this Court clearly establish a policy of favoring the validity of laws enacted in the exercise of the local government's police power and hesitancy in reviewing the state court's decision upholding the validity and constitutionality of local legislation. *Zucht* v. *King, et al.*, 260 U.S. 174, 67 L.Ed. 194, 198, ... S.Ct. .....; *Schmidinger* v. *City of Chicago*, 226 U.S. 578, 57 L.Ed. 364; *Fischer* v. *City of St. Louis*, 194 U.S. 361, 369-370, 48 L.Ed. 1018, 1023, 28 S.Ct. 673; *People of State of New York ex rel. Lieberman* v. *VanDeCarr*, 199 U.S. 552, 26 S.Ct. 144, 145, 50 L.Ed. 305. The federal question presented by Appellant in the instant case does not raise any federal question substantial in character, and under the test and fundamental rule announced in *Cusack* v. *City of Chicago*, 242 U.S. 526, 61 L.Ed. 472, 37 S.Ct. 190, this Court should decline jurisdiction though the repugnancy of this ordinance to be constitutional has been formally averred and raised. As was said in the *Cusack* case, this Court will not interfere with the exercise of local police power absent a record which shows on its face it is so clearly unreasonable and arbitrary as to have no real and substantial relationship to the proper exercise of the police power. As was said by the Court in the last referred to case:

> ". . . While this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state in enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that *it will interfere with the action of such authority only when it is plain and palpable that it has no real and substantial relation to the public health, safety, morals, or the general welfare.*" (Emphasis supplied)

The due process clause of the 14th Amendment to the United States Constitution authorizes only the very narrow scrutiny of this Court, and where, as in the instant case, the record on its face fails to show wherein the legislation attack is on its face, or as interpreted by the highest court of the state, so arbitrary and unreasonable, or uncertain and indefinite, as to violate those personal immunities "rooted in the tradition and conscience of our people as to be ranked fundamental" or those rights "implicit in the concept of ordered liberty", this Court will decline to exercise its jurisdiction to review the state court decision upholding the validity and interpreting a local statute or law. *Rochin* v. *California*, 342 U.S. 165, 168, 96 L.Ed. 183, 188, 72 S.Ct. 205, 25 A.L.R. 2d 1396.

The meaning and effect of the ordinance in controversy is a question of local law and the interpretation and determination made by the Missouri Supreme Court is conclusive upon the review by this Court, and appellant's attempt to argue a different and conflicting interpretation of the language of the said ordinance than that given it by the Missouri Supreme Court in *Kansas City* v. *Lee* is no more than a frivolous attempt to raise a federal question on grounds that the ordinance is repugnant to the due process clause of the 14th Amendment to the United States Constitution.

It does not appear from the face of the ordinance or upon the record of this controversy as presented to this Court or from any facts in evidence or which this Court make judicial cognizance, that the ordinance infringes any of Appellant's rights secured by the fundamental law or the principles of fairness and justice guaranteed by the due process of law clause of the 14th Amendment to the United States Constitution. The record in this case lacks any real and substantial foundation for Appellant's con-

tention of unconstitutionality, and it must be concluded that no federal question necessitating consideration by this Court has been raised, and the interpretation given this ordinance by the Missouri Supreme Court is not now open for attack or review. *Schmidinger* v. *City of Chicago, supra; Fischer* v. *City of St. Louis, supra.*

Appellant's Question No. 2

Appellant attempts in his second question presented, as well as the third, to seek this Court's review of the Missouri Supreme Court's interpretation of the ordinance in controversy as to the essential elements of the offense prescribed therein, and that court's decision reached on matters pertaining to the sufficiency of the evidence to support the conviction of Appellant for the unlawful possession of a federal wagering stamp with intent to use it for gambling purposes within the corporate limits of Kansas City. Notwithstanding a long line of decisions by this Court that it will not review the facts or evidence in the case and make determinations as to the sufficiency of such facts to justify a conviction, except in certain limited instances, Appellant would justify raising these questions on grounds that the decision of the state supreme court renders the ordinance so uncertain and indefinite as to violate the fundamental principles of fairness and justice required and guaranteed by the due process clause of the 14th Amendment of the Constitution of the United States. In this contention made by Appellant in an effort to support the jurisdiction of this Court, Respondent respectfully submits that Appellant raises questions decided by the state court on non-federal grounds, and, further, that such questions present no real or substantial federal questions necessitating review or further argument on the merits before this Court.

Having once decided that Respondent City of Kansas City could, in the proper exercise of its police power, declare unlawful the possession of a federal wagering stamp within the corporate limits of Kansas City, such enactment being fairly referable to and a reasonable exercise of the police power vested in the City, and having determined that the ordinance was directed against the possession of such a federal wagering stamp when accompanied with a certain requisite intent—intent to use it for gambling purposes—, the Missouri Supreme Court ruled that the trial court had erred in holding that "there would have to be proof of an overt act of gambling in order to constitute an offense under the ordinance if it were valid." The decision of the Supreme Court on this matter of evidence is one founded purely upon local law and a non-federal basis. The decision in this respect fails to present any substantial federal question necessitating the review by this court on the merits.

The construction of the language of the ordinance by the Missouri Supreme Court with regards to the essential elements which must be established by the evidence in order to sustain a conviction for an offense under the ordinance is conclusive upon this Court in accordance with those fundamental rules as set forth and cited in Respondent's discussion of Appellant's Question No. 1. Moreover, this Court will not interfere with the state supreme court's decision on the issue attack by Appellant's Question No. 2 because the record fails to substantiate any apparent merit in Appellant's argument at this point so as to present anything more than a federal question fictitious in nature, unfounded in substance and raised without fair color.

Notwithstanding Appellant's contention that such a construction of the ordinance and determination of the sufficiency of the evidence violates the due process guar-

antees of the federal constitution, no federal question is presented when applying the doctrine set forth in *Wilson* v. *State of North Carolina ex rel. Caldwell*, 169 U.S. 586, 593, ... S.Ct. ....., 42 L.Ed. 865, 870, wherein the Court announced:

> " 'To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law . . . If the Supreme Court has acted in consonance with the constitution and laws of the state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process . . . The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen to justify our inference.' "

Although it is of course recognized that the local police power cannot be exercised arbitrarily or discriminatorily, it must, as it has been said, *Hadacheck* v. *Sebastian*, 239 U.S. 394, 410, 60 L.Ed. 348, 356, "be remembered that we are dealing with one of the most essential powers of government—one that is the least limitable. It may, indeed, seem harsh in its exercise, and usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."

In deciding the proper interpretation of the municipal ordinance here in controversy with regards to the essential elements of the offense which must be proved to justify the conviction of Appellant, the Missouri Supreme Court determined that:

> "*The ordinance is directed against possession* with certain intent of an article . . .

"... But the ordinance does not permit a conviction merely by showing that the defendant has an intent to gamble. *It requires proof of possession of a federal wagering stamp with intent to use it for gambling purposes* ...

"The trial court, although concluding the ordinance was unconstitutional, also held there would have to be proof of an overt act of gambling in order to constitute an offense under the ordinance if it were valid. *Proof of an overt act of gambling would be admissible on the question of intent,* but *the trial court was in error in holding that the prosecution has to prove overt gambling in order to show offense under the ordinance.*" (Emphasis supplied)

Respondent respectfully submits that it fails to find any reasonable justification or merit in Appellant's contention that said language of the Supreme Court's decision renders the ordinance so vague, uncertain and indefinite in its meaning and application as to violate the due process of law guarantees of the 14th Amendment to the Constitution. Although it is of course recognized that a penal statute must be sufficiently explicit to inform persons what conduct is prescribed and prohibited and that the provisions must not be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application", the ordinance clearly expresses, as interpreted by the Missouri Supreme Court, that it is unlawful to possess a federal wagering stamp within the corporate limits of Kansas City with intent to use it for gambling purposes. Wherein, in light of its express terminology and the explicit language used by the Court in interpreting the provisions of the ordinance, can it be said with any merit or fair color that a person of ordinary intelligence would have to guess at its meaning and could not determine in advance what course it is lawful for him

to pursue. Respondent respectfully submits that the ordinance and the interpretation given it by the Supreme Court meet this essential test of certainty required by due process of law, and that such question raised in this respect fails to present any necessity for further argument on the merits with regard to the application of the doctrine of "void for vagueness". *Connally* v. *General Construction Co.*, (1925) 269 U.S. 385, 391, 392, 70 L.Ed. 322, 328-329.

This Court has recognized that it will abide by a strong presumption of validity with regards to legislative action and such legislative acts will not be automatically invalidated as vague simply because of difficulty found in determining whether certain marginal offenses fall within their language. *United States* v. *National Dairy Products, et al.*, 372 U.S. 29, 32, 9 L.Ed. 2d 561, 565, 83 S.Ct. 594, Reh. Den. 372 U.S. 961, 10 L.Ed. 2d 13, 83 S.Ct. 1011. The due process of law under the 14th Amendment requires no more than a reasonable degree of certainty, *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329, and Appellant's argument of confusion and difficulty in ascertaining the essential elements of the proscription made by the ordinance in question raises no substantial federal question. Mere difficulty of proving intent is not determinative of constitutionality of this ordinance though it makes intent to use the federal wagering stamp for gambling purposes an essential element of the offense. Respondent respectfully submits that there is no necessity of argument on the merits of this issue. The provisions of the ordinance making it unlawful to possess the federal wagering stamp within the corporate limits of the city, as constructed by the state supreme court, creates two essential elements of the offense—(1) possession of the federal wagering stamp, and (2) intent to use it for gambling purposes. This was the interpretation given the ordinance by

the Missouri Supreme Court, and according to this interpretation, the language of the ordinance affords reasonable notice of the criminal consequences of the act of possessing a federal wagering stamp with the requisite intent within the corporate limits of Kansas City. When measured by common understanding and practices, the language of the ordinance conveys sufficient definite warning as to the prescribed conduct so as to meet the test of due process of law, as prescribed by a long line of decisions rendered by this Court and for which there is no necessity of citation.

The decision of the Missouri Supreme Court that an overt act of gambling was not required to be proved in order to establish the essential elements of the offense under the ordinance was a matter of local law for state court decision and does not present a question decided on a federal basis. As said before, mere difficulty of proving intent is not determinative of constitutional issues, and in such instances the sufficiency of the evidence to establish an express and requisite intent under the terms of a penal statute is for the factfinder, in this case the Missouri Supreme Court in reviewing the evidence, and does not raise a question sufficient to confer jurisdiction upon this Court.

The Missouri Supreme Court in reviewing the evidence in the record found that the prosecution had established defendant's possession of the federal wagering stamp, that such a stamp bears a reasonable relationship and may justifiably be viewed with suspicion and concern, inasmuch as said stamp is applied for and issued in order to comply with certain federal statutes providing for a federal occupation tax on persons engaged in the business of accepting wagers. With regards to the question of establishing under the facts shown by the evidence in the record the essential element of intent to use the federal wagering stamp for gambling purposes, the Court found the pertinent facts to be as follows:

"In the present case the City proved the defendant had possession of the federal stamp. It also showed that when the police went to defendant's residence with a search warrant, they saw him through a doorway seated at a desk in the dining room area writing on a pad, which the officer identified as a play pad used in 'policy' where the writer keeps a record of what has been bet with him; also, there was in the room of the immediate area of defendant another pad showing totals and bets paid off and a bundle of policy slips showing the class and poll. At the same time, in answer to the policeman's query, the defendant said he did have a federal wagering stamp, and if he didn't he couldn't be out on the street writing, that he would be in trouble with the 'revenue' without it and in trouble with the police with it, and because of the police coming in with search warrants, and confiscating his materials, he didn't keep on hand as much as he used to, just one pad he was using on his days' writing."

The Court further noted that, although the testimony of the arresting officer was that he saw no physical gambling going on or, as Appellant would have it, no overt act of gambling, defendant did not "offer any evidence, and, of course, there was no evidence offered that he had the stamp for an innocent purpose."

The correctness of the Missouri Supreme Court's decision on the issues as to the sufficiency of the evidence does not raise a substantial federal question reviewable by this Court on appeal. The decision of the Supreme Court was that the prosecution had met the burden of proof of defendant's guilt by establishing under the evidence both of the essential elements of the offense prescribed by the municipal ordinance in controversy, the possession and the requisite intent. This Court will in all instances limit its inquiry on review to a determination of not whether the evidence was sufficient to justify the conviction, but whether there existed any evidence at all of whatever

quantity to support the conviction. *Garner* v. *Louisiana*, (1961) 368 U.S. 157, 7 L.Ed. 2d 207, 82 S.Ct. 248. This Court will not review the Supreme Court's determinations on this issue as broadly as Appellant would have it under his Question No. 2 for it will limit its inquiry in any event only to the question of whether or not Appellant's conviction rested on any evidence at all on each of the essential elements of the offense.

Respondent submits that the record clearly discloses that Appellant's conviction rested upon evidence which could be held without violating the fundamental principles of due process of law sufficient to justify Appellant's conviction, each of the essential elements of the offense having been adequately proven. Appellant is essentially attacking the sufficiency of the evidence as ruled upon by the Supreme Court of Missouri and his argument under Question No. 2 is concerned with an issue of state law and is not sufficient to raise a substantial constitutional question and this Court should deny its jurisdiction to review this matter. *U. S. ex rel. DeMoss* v. *Pennsylvania*, (1963 C.A. 3, Pa.) 316 F.2d 841, Cert. Den. 375 U.S. 859, 11 L.Ed. 2d 85, 84 S.Ct. 123.

The court has said, *Pennekamp* v. *Florida*, 328 U.S. 331, 345, 90 L.Ed. 1292, 1303:

> "While the ultimate power is here to ransack the record for fact in constitutional controversy we are customed to adopt the result of the state court's examination . . ."

This Court has historically accorded great respect to the conclusions of the state judiciary with regard to the evidence and fact in the record and its decisions thereon and will accept the conclusions of the triers on disputed issues unless the record is so lacking in evidentiary support that to give the judgment effect would work such

fundamental unfairness as to violate the due process guarantees of the Federal Constitution. *Akins* v. *State of Texas*, 325 U.S. 398, 402, 89 L.Ed. 1692, 1695. See also, *Fisk* v. *State of Kansas*, 274 U.S. 380, 385, 71 L.Ed. 1108, 1111.

The state court's decision that there was sufficient evidence to establish the element of intent required by the ordinance in controversy is an issue solely of fact, and as such, was for conclusive determination by the supreme court of the state, and according to the long line of recent decisions by this Court, a decision not open for reconsideration on appeal. *Wolfe* v. *North Carolina*, 364 U.S. 177, 196, 4 L.Ed. 2d 1650, 1653, 80 S.Ct. 482. The Supreme Court's decision that the evidence in the record justified and required an inference that the defendant possessed the federal wagering stamp with intent to use it for gambling purposes is an inference of fact not subject to review by this court and raises on appeal no federal question. *Turner* v. *People of the State of New York*, 168 U.S. 90, 95, 42 L.Ed. 392, 394.

The record in the case at hand fails to render Appellant's contention under his Question No. 2 with any fair color or merit that the state court's decision on the evidence raises a substantial federal question. On the face of the record in this case, the judgment of the Missouri Supreme Court is not so "totally devoid of evidentiary support" as to constitute or raise any substantial question that the appellant's guarantees under the due process clause of the 14th Amendment to the Constitution were violated thereby requiring the review by this Court on the merits of Appellant's argument. *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 15 L.Ed. 2d 176, 86 S.Ct. 211; *Thompson* v. *City of Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624, 80 A.L.R. 2d 355. The Missouri Supreme

Court's decision on the issues attack under Appellant's Question No. 2 is a matter of state law, and as such, was decided on a non-federal basis. Furthermore, that decision presents in this respect no substantial federal question which necessitates review by this Court or any further argument on the merits as the state court's decision is clearly consistent with the prior decisions of this Court as cited herein by Respondent in opposition to Appellant's Question No. 2. See also *Speiser* v. *Randall*, 357 U.S. 513, 2 L.Ed. 2d 416, 78 S.Ct. 332 (1958).

Appellant's Question No. 3

Appellant would assert that his third question presented confers jurisdiction upon this Court to review the state court decision in this case on grounds that the decision places the burden of proof upon the appellant or defendant charged with the violation of the ordinance in question rather than upon the prosecution, and in that respect, the fundamental principles of due process of law are thereby violated.

In this argument appellant not only erroneously construes the decision of the Missouri Supreme Court on this issue but also fails to present any substantial federal question necessitating review of this court.

Appellant contends at page 8 of his Jurisdictional Statement that:

> "The opinion indicates that a defendant charged with a violation of the ordinance may prove his innocence and by this statement, the court in effect held that if he fails to do so, he may be convicted by proof of his possession alone (Tr. 37). This places upon the defendant the burden of proving his innocence rather than requiring the prosecution to prove his guilt."

As for the decision on this issue, the Supreme Court held:

> "The ordinance is directed against possession with certain intent of an article which can reasonably be expected, if something is not done about it, to be used to violate the gambling laws . . .
>
> ". . . *But the ordinance does not permit a conviction merely by showing that the defendant has an intent to gamble.* It *requires proof of possession* of a federal wagering stamp *with intent to use it for gambling purposes.*" (Emphasis supplied)

The Supreme Court in so ruling did not eliminate as an essential element of the offense the requisite intent required by the provisions of the ordinance. Moreover, the Court commented at length upon the other evidence placed in the record, including Exhibits Nos. 1, 2 and 3, all of which were held to be admissible for the purpose of establishing the defendant's intent to use the federal wagering stamp for gambling purposes. In this the decision of the state supreme court is founded upon a non-federal basis and is not such a decision as is reviewable by this Court on appeal. The Court did comment that defendant's case in rebuttal to the prosecution's evidence consisted solely of cross-examination regarding an overt act of gambling, and in addition noted that the defendant failed to present and did not offer any evidence sufficient to rebut the reasonable inference to be drawn from all the evidence that he held possession of the federal wagering stamp for any other than an unlawful purpose. The decision of the Missouri Supreme Court on this point does not conflict with any decision of this Court on relevant substantive issues of federal law and necessitates no argument on the merits.

The inferences reached by the State Supreme Court and drawn from the facts and exhibits in the record before it are not so strained as to lack a reasonable relationship

to the circumstances of life as we know them, and are reasonable inferences to be drawn. The judgment as to the sufficiency of the facts and exhibits in evidence to establish the existence of the intent of Appellant to use the federal wagering stamp for gambling purposes is conclusive upon this Court. See *United States* v. *Romano*, 382 U.S. 1361, 15 L.Ed. 2d 210, 86 S.Ct. 279 (1965). The cases decided by this Court clearly are consistent with the decision of the Missouri Supreme Court in the instant case on the issues sought to be reviewed under Appellant's Question No. 3. This Court has long recognized that the burden of evidence may be shifted to the defendant without violating the fundamental principles of fairness and justice guaranteed by the due process clause of the 14th Amendment. See, for example, *United States* v. *Gainey*, 380 U.S. 63, 13 L.Ed. 2d 658, 85 S.Ct. 754, and *Speiser* v. *Randall*, 357 U.S. 513, 523, 524, 2 L.Ed. 2d 1460, 1471, 78 S.Ct. 1332. As declared by this Court in the last cited case, it is within the power of the states to regulate the burden of persuasion unless the fundamental principle of justice is violated by the lack of a rational connection between the facts proved and the ultimate fact to be presumed, and it is recognized that the burden of going forward with the evidence at some stages of a criminal trial may be placed upon the defendant. On the face of the record in this case the judgment of the Missouri Supreme Court was not in conflict with these decisions rendered by this court so as to require further argument on the merits. See also *Deitch* v. *City of Chattanooga*, (Tenn. 1953) 195 Tenn. 245, 258 SW 2d 776, and *Grigsby* v. *Mitchum, et al.*, 191 Kan. 293, 380 P.2d 363, Cert. Den., 375 U.S. 966, 11 L.Ed. 2d 415, 84 S.Ct. 483.

The decision of the Missouri Supreme Court on the issue of whether or not the prosecution had presented such fact and exhibits in evidence as to sustain and warrant the conviction of an appellant for the offense under Section

23.110, absent controverting and rebutting evidence on behalf of Appellant before the trial court, is a decision which rests upon adequate non-federal grounds and Appellant's Question No. 3 presented on this appeal fails to raise any substantial federal question reviewable by this Court. The question raised by Appellant in this respect is clearly and obviously an attempt to question the interpretation of the municipal ordinance preserved to the state court and a decision by the Supreme Court resting upon an examination and review of the sufficiency of the evidence in support of Appellant's conviction of the offense with which he was charged. This decision on this question is not open for review by this Court and the judgment of the state court should be followed.

CONCLUSION

Respondent respectfully submits, therefore, that Appellant presents no substantial federal questions necessitating argument upon the merits, review by and the decision of this Court, and that the judgment of the Supreme Court of Missouri rests on an adequate non-federal basis. Therefore, Respondent's motion to dismiss or in the alternative to affirm should be granted.

Respectfully submitted,

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